



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Not Reportable

Case No: 0027/2024EC

In the matter between:

DEMOCRATIC ALLIANCE

APPLICANT

and

CYRIL RAMAPHOSA

FIRST RESPONDENT

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

SECOND RESPONDENT

AFRICAN NATIONAL CONGRESS

THIRD RESPONDENT

ELECTORAL COMMISSION OF SOUTH AFRICA

FOURTH RESPONDENT

Neutral Citation: *Democratic Alliance v Ramaphosa and Others* (0027/2024EC)
[2024] ZAEC 24 (21 October 2024)

Coram: ZONDI JA, ADAMS and YACOOB AJJ

Heard: 25 July 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 21 October 2024.

Summary: **Electoral irregularities** – undue influence and abuse of power to influence the conduct and outcome of elections – Item 9(2)(e) of the Electoral Code of Conduct prohibits abuse of 'a position of power, privilege or influence' to influence

the conduct or outcome of an election – s 87(1)(g) of the Electoral Act which provides that no person may use public funds for the purpose of a political campaign – whether Presidential address on the eve of 2024 elections violates these statutory prescripts

Jurisdiction of Electoral Court – Electoral Commission Act – Electoral Disputes Rules – Electoral Court not just a Court of Review and Appeal – Electoral Court may sit as a court of first instance – s 96(1) of the Electoral Act suggests that the statutory purpose was to create a specialist court that would deal with all electoral matters, Application dismissed with no order as to costs.

ORDER

The application is dismissed, with no order as to costs.

JUDGMENT

The Court

[1] An essential part and a founding value of our constitutional democracy is the right to free, fair and regular elections. This right is closely related to the right to make political choices and every adult citizen's right to vote in elections for any legislative body established in terms of the Constitution,¹ and to do so in secret. It goes without saying that these rights, enshrined in the Bill of Rights, are not to be unreasonably limited or unlawfully interfered with. And to that end, the Electoral Act 73 of 1998 (the Electoral Act)² seeks to ensure that there is no interference with such rights by persons in position of power or public officials.

[2] At the heart of this matter is the wording of Item 9(2)(e) of the Electoral Code of Conduct ('Code'), which prohibits anyone and everyone from abusing 'a position of power, privilege or influence, including parental, patriarchal, traditional or employment authority to influence the conduct or outcome of an election'. Also in issue in this matter is a proper interpretation of s 87(1)(g) of the Electoral Act which provides that no person may 'use public funds ... for the purpose of a political campaign'.

[3] The wording of these provisions has to be interpreted and applied to a speech made by the second respondent, the President of the Republic of South Africa (the President) and broadcast on national TV on 26 May 2024 on the eve of the national

¹ The Constitution of the Republic of South Africa, 1996.

² Electoral Act 73 of 1998.

and provincial elections. The question is thus whether, in making the speech, the President contravened the aforesaid provisions.

[4] The applicant, the Democratic Alliance (DA), is a represented political party, duly registered in terms of s 15 (Chapter 4) of the Electoral Commission Act (Commission Act),³ as is the third respondent, the African National Congress (ANC). The first respondent (Mr Ramaphosa) is the leader of the ANC, which, at the relevant time, was the ruling party, with a majority of seats in the National Assembly. Mr Ramaphosa is also cited in these proceedings as the second respondent in his official capacity as the President of the Republic of South Africa. The fourth respondent is the Electoral Commission of South Africa (Commission), which is the body constitutionally mandated to manage elections in this country. The Commission has indicated formally that it does not intend opposing the relief sought by the DA and that it will abide the decision of this Court.

[5] The DA seeks an order declaring that the President's 'Presidential Address' delivered on 26 May 2024 violated Item 9(2)(e) of the Code and s 87(1)(g) of the Electoral Act, as well as ss 19(2) and (3) of the Constitution. Additionally, the DA seeks an order directing Mr Ramaphosa to pay a fine of R200 000 in terms of s 96(2)(b) of the Electoral Act. We interpose here to mention that in its notice of motion the DA also applies for an order, in terms of s 96(2)(g) of the Electoral Act, that the votes cast for the ANC in the national election, be reduced by 1%. However, at the hearing of the matter on 25 July 2024, the DA indicated that it was no longer pursuing that relief.

[6] The first, second and third respondents ('respondents') oppose the relief sought by the DA on various grounds. Besides opposing the application on its merits, the first and third respondents have also raised a point *in limine* to the effect that this Court lacks jurisdiction to entertain this application (jurisdictional point). As regards the merits, the respondents submit that the presidential address was delivered by Mr Ramaphosa in his capacity as the head of state as opposed to in his capacity as the leader of the ANC and that he acted within his powers as head of state when

³ Electoral Commission Act 51 of 1996.

delivering the said address. Moreover, so the President contends, applying a proper constitutional interpretation of these provisions, his address, when accorded the meaning that an ordinary, reasonable observer would have attributed to it, did not constitute a misuse of public funds for purposes of a political campaign or an abuse of the President's power in order to influence the outcome of the election.

[7] The issue to be considered by this Court is therefore whether there has been a contravention of Item 9(2)(e) of the Code and s 87(1)(g) of the Electoral Act, properly construed and correctly interpreted. Stated differently, the main issue is whether Mr Ramaphosa campaigned politically or sought to influence the conduct or outcome of the election when he gave his speech. That question is to be considered against the factual backdrop of the matter and, importantly, having regard to the contents of the presidential address. The facts are by and large common cause and are set out later in the judgment.

[8] Before considering the merits of the application it is necessary to first deal with the jurisdictional point raised by the first and third respondents. Since the person who has deposed to the answering affidavit on behalf of the first and third respondents is the ANC's Secretary General, we refer to those two respondents accumulatively as the ANC, for convenience.

Jurisdiction

[9] It is submitted by the ANC that the DA has wrongly approached the Electoral Court as a court of first instance as opposed to approaching the High Court with jurisdiction to hear the matter. The Electoral Court, so the contention goes, is a court of review and appeal especially as regards transgressions and contraventions of certain provisions of the Electoral Act and the Code.

[10] Sections 20(3) and (4) of the Commission Act, which provides for the powers, duties and functions of the Electoral Court, reads as follows:

'(3) The Electoral Court may determine its own practice and procedures and make its own rules.

(4) The Electoral Court shall –

- (a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act, 1993 (Act 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and
- (b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements and appeals against decisions arising from such hearings.'

[11] In terms of s 20(3) of the Commission Act, the Electoral Court promulgated a set of Rules Regulating the Conduct of the Proceedings of the Electoral Court ('Procedure Rules'). And, as provided for in s 20(4), the Electoral Court, promulgated Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct in Schedule 2 of the Electoral Act, and Determination of Courts having Jurisdiction ('Electoral Disputes Rules').

[12] Rule 2 of the Electoral Disputes Rules, under the heading '*Determination of Courts and Jurisdiction*', reads as follows:

- '(1) The Magistrate's Court and the High Court in whose area of jurisdiction –
 - (a) any electoral dispute; or
 - (b) any complaint about an infringement of the Code, has arisen, have subject to subrules (2) and (3), jurisdiction to hear such dispute or complaint.
- (2) The following courts have jurisdiction to impose the following sanctions referred to in section 96 of the Act:
 - (a) The Court [referring to the Electoral Court], all the sanctions in subsection (2);
 - (b) The High Court, all the sanctions in subsection (2) except 2(h) and (i);
 - (c) The Magistrate's Court, all the sanctions in subsection (2) except (2)(d)(vii), (h) and (i) and with regard to the sanctions in subsection (2)(b) and (c), the Magistrate's Court must have regard to its civil jurisdiction. '

[13] For context, it may be apposite to cite here the provisions of s 96 of the Electoral Act, which reads as follows: -

'96 Jurisdiction and powers of Electoral Court

- (1) The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review.

- (2) If a court having jurisdiction by virtue of section 20(4)(b) of the Electoral Commission Act finds that a person or registered party has contravened a provision of Part 1 of this Chapter it may in the interest of a free and fair election impose any appropriate penalty or sanction on that person or party, including –
- (a) a formal warning;
 - (b) a fine not exceeding R200 000;
 - (c) the forfeiture of any deposit paid by that person or party in terms of section 27(e) or paid by an independent candidate in terms of section 31B (3)(b);
 - (d) an order prohibiting that person or party from –
 - (i) using any public media;
 - (ii) holding any public meeting, demonstration, march or other political event;
 - (iii) entering any voting district for the purpose of canvassing voters or for any other election purpose;
 - (iv) erecting or publishing billboards, placards or posters at or in any place;
 - (v) publishing or distributing any campaign literature;
 - (vi) electoral advertising; or
 - (vii) receiving any funds from the State or from any foreign sources;
 - (e) an order imposing limits on the right of that person or party to perform any of the activities mentioned in paragraph (d);
 - (f) an order excluding that person or any agents of that person or any candidates or agents of that party from entering a voting station;
 - (g) an order reducing the number of votes cast in favour of that person or party;
 - (h) an order disqualifying the candidature of that person or of any candidate of that party; or
 - (i) an order cancelling the registration of that party.
- (3) Any penalty or sanction provided for in this section will be in addition to any penalty provided for in Part 3 of this Chapter.’ (own emphasis).

[14] Rule 2(3) of the Electoral Disputes Rule, which sets out the instances in which the Electoral Court can be approached directly, reads as follows: -

- ‘(3) A party may approach the Court directly in respect of any electoral dispute or complaint about an infringement of the Code –
- (a) where a sanction referred to in section 96(2)(h) or (i) is sought; and
 - (b) notwithstanding the provisions of subrule (1), in any matter where special circumstances are present, with prior leave of the Chairperson and at least two members of the Court.’

[15] The ANC contends that it is apparent from these provisions that direct access to this Court is restricted to electoral disputes or complaints about the infringement of the Electoral Code where a sanction is sought under s 96(2)(h) and (i) of the Electoral Act. Accordingly, so the contention continues, the DA should have approached the High Court for the relief it seeks. Moreover, this Court could only have been approached directly if the DA had first sought and received leave to do so in accordance with Rule 2(3) of the Electoral Disputes Rules and only if 'special circumstances are present' and 'with prior leave of the Chairperson and at least two members of the Court'. No such 'prior leave' so it was argued, was sought by the DA nor granted to it.

[16] The ANC accordingly submits that this Court lacks the necessary jurisdiction to hear this matter and, on this basis alone, the application should be dismissed.

[17] Recently – in *Electoral Commission v Reddy and Others (Reddy)*⁴ – this Court was required to consider the lack of jurisdiction point *in limine* in a matter involving contraventions of s 87 of the Electoral Act. In that matter it was also contended on behalf of the respondents that, if regard is had to the above provisions of the Electoral Act and the Electoral Disputes Rules, this Court does not have court of first instance jurisdiction.

[18] After a thorough review of the authorities, this Court rejected the jurisdiction point and expressed itself as follows:

'The aforementioned dicta confirm inter alia that the Electoral Court may sit as a court of first instance and that there will be recourse to challenge the decision of this Court. As stated earlier, such litigants will be in a position to approach the Supreme Court of Appeal or the Constitutional Court. The application before this Court is, however, qualified by the nature of the relief sought. Importantly, the relief that is sought by the Commission is relief that only this Court is empowered to grant. Furthermore, s 96(1) cannot be read in isolation but in conjunction with Rule 2(3) of this Court. This finding gives context to the right to free and fair elections, and this is what the Commission in its application before us seeks to enforce. There

⁴ *Electoral Commission v Reddy and Others* 2024 JDR 2858 (EC).

is accordingly no merit to the contention of the respondents that 'final jurisdiction' in s 96(1) only refers to appellate jurisdiction.

In as much as the original complaint related to infringements of the Code, it is evident that they also constitute transgressions of the Act. The Commission elected to pursue these transgressions as prohibited by the Act. In light of the nature of the relief sought against Mr Reddy, this Court has jurisdiction. It would have served no purpose to institute a separate application before the high court to hear the matter of Mr Khanyile because the same complaint, albeit relating to different statements, applies to both of the respondents. No prejudice is suffered by any of the respondents if this Court is hearing the application as a court of first instance. Rule 2(3) specifically provides for such an application. In my view, the said rule re-emphasizes direct access to this Court where a sanction of disqualification is sought.⁵

[19] We respectfully adopt the reasoning and conclusion in *Reddy*. The simple point is that there is no merit in the contention of the ANC that 'final jurisdiction' in s 96(1) only refers to appellate jurisdiction. Moreover, Rule 2(1) and (2) of the Electoral Disputes Rules cannot and should not be interpreted as ousting this Court's jurisdiction to sit as a Court of first instance. On the contrary, and as pointed out by this Court in *Reddy*, the said rule reiterates this court's jurisdiction. The intention could never have been to limit the range of disputes that would fall within the ambit of the Electoral Court's jurisdiction, so that some electoral issues would fall within its jurisdiction and others not. The intention was clearly to expand jurisdiction to additional courts. It is trite that if this expansion had encompassed some kind of ouster of this court's first instance jurisdiction, that ouster would have had to be explicit. The language used in s 96(1) suggests that the statutory purpose was to create a specialist court that would deal with all electoral matters. When a specialist court is created the apparent purpose of creating a single forum for resolving disputes of a particular type is not to be stultified by a resort to undue literalism and too careful a parsing of statutory language.

[20] The ANC's point *in limine* of lack of jurisdiction therefore falls to be dismissed.

⁵ Ibid paras 32 and 33.

The Facts

[21] That brings us back to the facts. On Sunday, 26 May 2024, three days before the elections, Mr Ramaphosa addressed the nation in a televised speech. According to the DA, Mr Ramaphosa, in supposedly addressing the nation as president of the country (rather than as the president of the ANC), used the office of the Presidency to give a speech, broadcast on national television, during which he flaunted 'supposed' achievements of the ANC. He paraded these achievements to garner votes for the ANC, so the DA contends.

[22] The DA's case is that it is clear from the speech's political contents that Mr Ramaphosa campaigned politically when he gave the speech and he sought to influence voters to vote for the ANC. The speech presented, according to the DA, an argument that the 'sixth administration', comprised primarily of the ANC, made significant achievements on matters of public importance. He focused on the 'path' the ANC-administration paved over the last five years and suggested, according to the summary proffered in the DA's papers, that his administration had tackled crime and corruption; doused the scourge of gender-based violence; reduced load-shedding; addressed unemployment; invested in public infrastructure; implemented a minimum wage; introduced the National Health Insurance Act; and increased the number of police by 20 000 and introduced legislation to tackle crime.

[23] All of these, asserted the DA, are pressing political issues that concern members of the public. These are issues on which the South African voter decides for whom to vote. Mr Ramaphosa was addressing these topics, so the case on behalf of the DA goes, to present an argument to voters that the ANC has done well over the last five years and therefore urged them to vote for it.

Discussion and Analysis

[24] The question whether the President's address falls foul of item 9(2)(e) of the Code and s 87(1)(g) of the Electoral Act ('the applicable provisions') is both interpretive and factual. The interpretive question is twofold. First, the applicable provisions must be interpreted to determine whether they apply to a speech given by the President in the circumstances outlined above, and second, the speech itself

must be interpreted to determine whether it falls within the proscribed parameters and would attract a penalty as contended by the DA in this case.

[25] The principles of interpretation to be applied to the applicable provisions are well-established, although the parties are not *ad idem* about the result of that application. It was submitted for the DA that the test to be applied as to whether the speech fell foul of the provisions is an objective one, but of course that submission skips the first test, which is to determine whether the speech falls within the parameters of the provisions in the first place. The President denies that it does.

[26] The respondents submit that Item 9(2)(e) of the Code and s 87(1)(g) of the Electoral Act must be interpreted and applied: (a) in a manner that promotes the constitutional rights of everyone to receive information from the President of the Republic (s 16(1)(b) of the Constitution)⁶ as well as the rights of Mr Ramaphosa, as a citizen, to stand for public office whilst being the President in office (s19(3)(b) of the Constitution),⁷ (b) in a manner that gives effect to constitutional declarations, guarantees and responsibilities contained in the Constitution (s 39(2) of the Constitution),⁸ and (c) having regard to its context provided by reading it in light of the Code as a whole, using the ordinary rules of grammar and syntax, the context in which the provision appears, and the apparent purpose to which item 9(2)(e) is directed.⁹

[27] The President submitted that the construction of item 9(2)(e) contended for by the DA, that being that it includes positions of public power, unduly restricts the President from addressing the nation during an election period. In effect, it calls for

⁶ '16 **Freedom of expression**

(1) Everyone has the right to freedom of expression, which includes-

(a) ...

(b) freedom to receive or impart information or ideas;

⁷ '19 **Political rights**

(3) Every adult citizen has the right-

(a) ...

(b) to stand for public office and, if elected, to hold office.'

⁸ '39 **Interpretation of Bill of Rights**

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

the suspension of the exercise of Presidential powers or the discharge of the Presidential responsibilities during an election. It was submitted for the DA at the hearing of the matter that, indeed, any address of the nation at this critical point of an election period, which deals with issues that are part of the highly contested political terrain, is proscribed by these provisions.

[28] To the extent that it would mean that the President is prevented from mentioning to the citizens of the Republic any matters of public import during the election period, we agree with this submission. An interpretation that is as wide as that would unjustifiably deprive the citizens of the Republic of their right to receive information from the President during an election period. It may also deprive the citizens of their right to the benefit of the exercise by the President of his responsibilities to the extent that he may be able to exercise them in fostering a free, fair and peaceful election. Moreover, an interpretation of item 9(2)(e) of the Code that leads to the result contended for by the DA may well conflict with s 39(2) of the Constitution and s 2 of the Electoral Act 73 of 1998 (the Electoral Act).

[29] However, the respondents' contention that item 9(2)(e) cannot include positions of public power may also be too broad, and err on the side of protecting the rights of officials over the rights of the broader electorate.

Interpretation of s 87 and item 9(2) of the Code

[30] Section 87 is located in Part 1 of Chapter 7 of the Electoral Act which deals with 'prohibited conduct'. Undue influence, which is one of the activities that constitutes prohibited conduct, is dealt with in s 87. Section 87(1)(g) prohibits the use of public funds except for the funds allocated to a party in terms of s 5 of the Public Funding of Represented Political Parties Act 103 of 1997 (Public Funding Act) 'for the purpose of a political campaign.'

[31] The concept of 'political campaign' is not defined in the Electoral Act. In the context of elections 'political campaigns' refer to electoral campaigns. What it means is that the representatives of political parties cannot use public funds to sell their parties' aims, policies or objectives to the electorate. The purpose of the provision is

to prevent those who have access to public funds from using those funds in order to advance their parties' interest so as to entrench or advance the dominance of their parties in a political landscape with the result that democracy is weakened.

[32] Under the heading 'prohibited conduct' item 9(2)(e) of the Electoral Code provides that no person may 'abuse a position of power, privilege or influence, including parental, patriarchal, traditional, or employment authority to influence the conduct or outcome of an election'. Abuse of position of power privilege or influence may take various forms. Item 9(2)(e) places a constraint on the performance of powers by officials such as the President. In other words, its purpose is to ensure that just because the President is performing a public power, does not mean that that power has no constraints placed upon it. Both s 87(1)(g) and item 9(2)(e) are directed at achieving the same objective, namely the prevention of abuse of power, including through unlawful use of public funds, in order to influence the conduct or outcome of elections.

[33] The requirement of free and fair elections is entrenched in s 19(2) of the Constitution. The subsection provides that 'every citizen has the right to free, fair and regular elections for any legislative body established in terms of the constitution'. The right to vote and the right to free and fair elections are interrelated. The law recognises that while the right to vote gives content to the right to free and fair elections, the right to free and fair elections clarifies how the right to vote must be exercised. Thus, if the elections are not free and fair, no proper exercise of the right to vote is possible and accordingly, the content of the right to vote itself is meaningless.

[34] The Constitutional Court in *Kham and Others v Electoral Commission and Another*¹⁰ at paragraph 87 held that a free and fair election entails the ability of political parties and candidates to 'compete with one another on relatively equal terms' and on a 'level playing field' without 'any undue hindrance or obstacle

¹⁰ *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 CC; 2016 (2) SA 338 (CC) para 87.

occasioned by the manner in which the preparations for the election have been undertaken or the way in which the election has been conducted’.

[35] The Electoral Act seeks to regulate and give content and meaning to the right to free and fair election and the right to vote. It is for this reason that the Act prohibits various forms of conduct calculated to undermine the integrity of an election. The overall purpose of the prohibition is to ensure conditions that are conducive to the achievement of free and fair elections and to prevent infringement of the right to vote.¹¹

[36] The Electoral Code seeks to achieve the same purpose as s 87 of the Electoral Act. Item 9(2)(e) of the Code prohibits various forms of conduct that are antithetical to a free and fair election, including speech or acts that may provoke violence during an election and the abuse of power, privilege or influence to influence the conduct or outcome of an election. Therefore, properly interpreted, s 87 of the Electoral Act and item 9(2)(e) of the Code have as their object to prohibit conduct that may undermine the conditions that are required for free and fair elections. A free election implies the non-existence of, or restrictions on, the elements of coercion and manipulation allowing a voter to decide how to exercise their right to vote. This is important because it ensures that an electoral process produces an outcome that can bring about material changes in the lives of the citizens.

[37] At the same time, s 87(1)(g) and item 9(2)(e) must be interpreted in a manner which enables, and does not unduly inhibit, the fulfilment of the constitutional obligations owed by elected officials to members of the public. In the context of this matter this means that these provisions must not be interpreted in the manner that would undermine the President’s discharge of the obligations imposed upon him by ss 83 and 84 of the Constitution and his ability to perform the functions entrusted to him by these two provisions.

¹¹ *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 para 37.

[38] In terms of ss 83 and 84 of the Constitution, the President of the Republic has all the power necessary to carry out the functions that he or she is given under the Constitution or legislation. Section 83 of the Constitution sets out the executive functions of the President as follows:

‘The President

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) promotes the unity of the nation and that which will advance the Republic.’

Section 84 of the Constitution sets out the powers and functions of the President. It provides, in section 84(1), that:

‘The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.’

[39] The outcome of the application to the speech of s 87 and item 9 contended for by the DA has the potential to unduly inhibit the President's ability to discharge the obligations imposed upon him by ss 83 and 84 of the Constitution and such construction must be avoided to the extent that it results in a blanket prohibition of any speech by the President as President during the election period which touches on issues which may also be campaign issues.

[40] There is another reason why the construction contended for by the DA cannot be applied as a blanket prohibition. It fails to recognise that the prohibitions in the Electoral Act and Electoral Code carry penal sanctions and that they must be interpreted restrictively. These prohibitions have the potential to muzzle free speech by candidates and political parties including speech by elected officials in the course of performing their constitutional and statutory obligations. The prohibitions in the Electoral Act and Electoral Code which the DA asks this Court to enforce impose severe penalties on those who breach them such as imposition of hefty fines and deductions of votes cast for the party whose member may be found to have violated them. The speech or utterance concerned must therefore be interpreted to determine whether it in fact falls foul of the relevant provisions. The identity of the speaker and the subject matter cannot, in themselves, automatically result in a finding of a contravention.

[41] There is another reason why the construction contended for by the DA cannot be accepted. It fails to recognise that the prohibitions in the Electoral Act and Electoral Code carry penal sanctions and that they must be interpreted restrictively. These prohibitions have the potential to muzzle free speech by candidates and political parties, including speech by elected officials in the course of performing their constitutional and statutory obligations. The prohibitions in the Electoral Act and Electoral Code which the DA asks this Court to enforce impose severe penalties on those who breach them such as imposition of hefty fines and deductions of votes cast for the party whose member may be found to have violated them.

[42] The objective test of the reasonable reader in the defamation context is instructive in assessing the impact of the Presidential Address on the electorate. The address of the President must be looked through the eyes of an ordinary observer.¹² The reasonable observer subscribes to the norms and values of the Constitution, which must inform all laws. We agree with the President's submission that the reasonable reader/viewer of normal intelligence would not have construed the Presidential Address in the manner contended for by the DA. The reasonable reader/viewer would have assigned ordinary meaning to the words used by the President, that being that 'we' as a country and as a people of the Republic have worked together for the last five years to accomplish what has been achieved. In addition, it is our view that the DA's summary of the President's speech overstates what the President claims has been achieved by the sixth administration. A great deal of the issues are simply mentioned as challenges that, in one way or another, have had to be dealt with.

[43] For these reasons, we conclude that the Presidential address did not contravene item 9(2)(e) of the Code. The simple point is that, if one has regard to the speech as a whole, it has to be accepted that the objective effect of the Presidential address was to apprise the nation on the readiness of the country to hold national and provincial elections and the importance of having a government. We disagree with the submission by the DA that the speech was disguised electioneering or

¹² *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) para 89.

elections campaign. Electioneering involves taking action and campaigning to be elected to a political position. The President did none of this.

[44] There was therefore no violation of the Electoral Act, the Code or the Constitution as alleged by the DA. There has also been no case made out against the second respondent either.

[45] The point is that, presented with security concerns that had been drawn to his attention, the President exercised the wide discretion and power granted to him by the Constitution as Head of State. In so doing, he adhered to the Constitution. His objective was to encourage and energise South Africans to go out as a diverse but united nation and vote for the future of the country with confidence in the electoral system and without fear. This, in our view, was the object and the purpose of the Presidential Address.

[46] As submitted by the President, his address was no different from the many presidential addresses made by him during his presidency. All he did was to frame an issue of pressing national concern – in this case, democratic participation in the national election – by reflecting on the achievements and resilience of South Africans collectively. This was reflected in the language used by the President, which used the collective ‘we’ repeatedly, each time referring to South Africans as a whole and various sectors and formations within South African society.

[47] In this way, the address covered two main topics: first, the country’s readiness for the forthcoming elections and, thereafter, the need for national unity and participation in the democratic process given the shared history of its citizens, shared challenges and shared achievements. At no stage did the President ever refer to any particular political party, organisation, individual or institution and this was in line with the over-arching theme of unity and collective action. It bears emphasising that the President made no mention of the ANC or its manifesto. Instead of promoting the ANC, as suggested by the DA, the President spoke of institutional and collective successes and gave credit to members of all parties for Parliament’s legislative

achievements. He also hailed the achievements of diverse formations within South African society, ranging from civil society actors to the parents of school learners.

[48] For these reasons, we conclude that the President did not campaign politically when he gave his speech.

[49] Moreover, and as already alluded to above, applying a proper, constitutional interpretation of these prohibitions in question, the President's address, when accorded the meaning that an ordinary, reasonable observer would have attributed to it, did not constitute a misuse of public funds for purposes of a political campaign or an abuse of the President's power in order to influence the outcome of the election. It cannot be said with any conviction that a reasonable, ordinary observer would have interpreted the President's address as promoting the electoral platform of the ANC. The President used his power to address the nation for a legitimate purpose that supported, rather than undermined, a free and fair election.

[50] We therefore conclude that there was no misuse of public funds for purposes of a political campaign, as contemplated in s 87(1)(g) of the Electoral Act, or an exertion of abuse of the President's power to influence the outcome of the election, as contemplated in Item 9(2)(e) of the Electoral Code. Nor was there any violation of ss 19(1) and (2) of the Constitution.

[51] In our view, there is no evidence before us that the President's address influenced a single voter. Conversely, the President explains in great detail the reasons why he made the address, and he has demonstrated his *bona fide* belief that the address served the public good and was not calculated to unduly influence voters. We have no reason not to accept this explanation by the President.

[52] The simple point is that the President, in addressing the nation on 26 May 2024, was doing what s 83(c) of the Constitution enjoins him to do, that being to promote national unity and to advance the interests of the Republic. It is permissible, and indeed desirable, for the President, in pursuit of these objects, to take steps to keep the public informed about the state of the nation, the government's actions and the challenges facing the country. His address adhered to established legal and

ethical norms for governmental communication that have been a common practice in our country since the COVID-19 pandemic. The address focused on informing the public about the election process and encouraged participation in the election by highlighting national progress and challenges.

[53] Importantly, when assessed holistically, the President's conduct did not, in our view, compromise the freeness or fairness of the election. Moreover, there is no evidence that the President's address had any tangible impact on the election.

[54] For all of these reasons, we conclude that there has not been a violation of the provisions of the Electoral Act and the Code as alleged by the DA, nor any violation of the Constitution. The DA's application therefore falls to be dismissed.

Costs

[55] The award of costs is a matter which is within the discretion of the court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious. There is no reason in this matter to depart from the general principle. That being the case, each party should therefore bear its own costs.

Order

[56] In the result, the following order is made:

The application is dismissed, with no order as to costs.

D H ZONDI
Chairperson of the Electoral Court
Bloemfontein

L R ADAMS
Acting Judge of the Electoral Court
Bloemfontein

S YACOOB
Acting Judge of the Electoral Court
Bloemfontein

APPEARANCES

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For the first and third respondents:	N Cassim SC and X Stylianou SC and L Mgudlwa and S Mahlangu
Instructed by:	Ntanga Nkuhlu Incorporated, Honeydew
For the second respondent:	N Maenetje SC and H Rajah and PMP Ngcongo
Instructed by:	The State Attorney, Pretoria
For the fourth respondent:	No appearance
Instructed by:	Gildenhuys Malatji Incorporated, Pretoria